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IN THE

Supreme Court of the United States

October Term, 1941

AMERICAN NATIONAL BANK AT INDIANAPOLIS, as Trustee,
Petitioner,

v.

THE SERVICE LIFE INSURANCE COMPANY,
Respondent.

No. 343

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Counsel for Petitioner.

MARK GRAY CO., INDIANAPOLIS

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AMERICAN NATIONAL BANK AT INDIANAPOLIS, as Trustee,
Petitioner,

v.

THE SERVICE LIFE INSURANCE COMPANY,
Respondent.

No. --------

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Supreme Court of the United States:

American National Bank at Indianapolis, as Trustee, respectfully petitioning, shows the Court:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED.

A. Nature of the action and decrees below.

This suit was commenced by petitioner, as Trustee, against respondent, to recover the face amount of $5,000.00

on a policy of life insurance issued by the respondent on the life of Charles Leona Badger. (R. 1-3.)

Trial was held by the Court without the intervention of a jury. The trial court made findings of fact (R. 12-57), and stated its conclusions of law thereon to the effect that the law was with the petitioner. (R. 57.)

Judgment was entered for petitioner. (R. 57.) Respondent appealed to the Circuit Court of Appeals for the Seventh Circuit. (R. 58.) The cause was reversed and it was held that the policy had expired one day prior to the death of insured, Charles Leona Badger. (R. 70-77.)

The opinion of Judge Briggle (R. 70-77) held that in the computation of time *from the date of the policy* (as provided in the policy), that the first day should be included and the last excluded.

Petitioner filed its petition for a rehearing within the time allowed (R. 78) which was denied by the Circuit Court of appeals without opinion. (R. 80.)

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Acts of February 13, 1925, C-229 (43 Stat. 938); June 7, 1934, C-426 (48 Stat. 926, 28 U.S.C. 347).

The opinion of the Circuit Court of Appeals was filed and a decree entered on May 9, 1941. (R. 77.) Petitioner's petition for a rehhearing was filed within the time allowed by the rules of said court, to-wit: on May 24, 1941 (R. 78), and

was denied by the Court without opinion on May 29, 1941 (R. 80).

This petition for certiorari was filed before the expiration of three months from May 29, 1941.

III.

STATEMENT OF FACTS.

The facts were stipulated. (R. 12.) The Court adopted the written stipulation of the parties as its special findings of fact. (R. 12.)

The respondent on October 5, 1930, issued its policy of life insurance on the life of Charles Leona Badger in the face amount of $5,000.00 in consideration of the payment in advance of an annual premium of $299.85 (R. 47; 40-50).

The insured, paid four full annual premiums. (R. 41.) No premium was paid on October 5, 1934, or thereafter. The policy was free from indebtedness, and all policy dividends had been paid. (R. 14.)

On January 2, 1935, after the due date of the 1934 premium, respondent wrote insured that:

> "You are hereby notified that the above numbered policy, which you allowed to lapse through non-payment of premium, is now continued as Non-Participating Term Insurance *dated from October 5*, 1934, which is the due date of the premium in default.
>
> Please inform us of any future change in your residence or post office address." (R. 14, offered R. 11.) (Emphasis supplied.)

On January 8, 1935, the insured wrote respondent as follows:

> "I am in receipt of yours of the 2nd inst. saying that my policy No. 5221 was now continued as non-participating term insurance, *dated from 10-5-34.*
>
> Will you please inform me of the date of expiration of this term insurance. I wish to know at this time the date on which this insurance will expire.." (R. 15, offered R. 11.) (Emphasis supplied.)

Respondent answered the insured's letter on January 11, 1935, saying:

> "Thank you very kindly for your letter of January 8, concerning your policy No. 5221.
>
> In answer to your question as to how long your policy will be continued under the extended insurance feature, we wish to advise that it will continue under this feature *to February 5*, 1939.
>
> Sincerely trusting that the above answers your inquiry satisfactorily, and with best wishes, we are." (R. 15, offered R. 11.) (Emphasis supplied.)

The policy provided in part that:

> "In consideration of the written and printed application for this policy and the further consideration of the sum of Two Hundred Ninenty-nine Dollars, Eighty-five Cents *to be paid in advance*, being the premium for the *term ending one year from the date hereof*, and the legal reserve, if any, and the further payment *in advance* of annual premiums of $299.85 *on or before the 5th day of October* of each year, during the continuance of this policy, or until nineteen full years' premiums including the first have been paid, this policy is issued." (R. 41, offered R. 11.) (Emphasis supplied.)

The date referred to by the words "from the date hereof" is October 5, 1930 (R. 47).

The policy also provided that:

> "All premiums, both first and renewals, are payable *in advance* . . . ." (R. 44, offered R. 11.) (Emphasis supplied.)

After the payment of four full annual premiums, as in this case, the policy provided that insured had automatic extended insurance for four years and four months. (R. 46.)

The fourth full annual premium was paid in advance by the insured in 1933. The advance premium due on or before October 5, 1934, was not paid.

The insured died at Indianapolis, Indiana, at 7:55 P. M., on February 5, 1939. (R. 16.)

At the request of insured, American National Bank at Indianapolis, Trustee under a Trust Agreement as of May 4, 1934, petitioner (R. 19-34, offered R. 11) was named beneficiary under the policy. (R. 35.)

After the death of insured, petitioner properly furnished to respondent, the proofs of deaths required (R. 16.)

IV.

QUESTIONS PRESENTED.

Upon the record and the opinion of the Circuit Court of Appeals, there is presented the following important questions:

1. Whether the Circuit Court of Appeals wholly disregarded the applicable Indiana law and thus violated the rule established by this Court in *Erie Railroad v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188; *Stoner v. New York Life Insurance Co.*, 85 L. ed. (adv.) 275, *Wichita Royalty Company et*

al. v. City National Bank, 306 U. S. 103, and *Equitable Life Insurance Co. of Iowa v. Halsey, Stuart & Company,* 85 L. ed. (adv.) 631, and similar cases in deciding as follows:

(a) That, in computing the four years and four months automatic extended insurance to which the insured became entitled upon default in premium payments, the first day, viz: October 5, 1934, is to be included, and hence the extended insurance expired at the end of the day on February 4, 1939; one day prior to insured's death.

(b) In deciding that the words of the policy *"for the term ending one year from the date hereof"* (R. 41) did not require the exclusion of the first day, viz: October 5, 1934, in determining the duration of four years and four months of extended insurance.

(c) In holding that the policy terms were unambiguous.

V.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The Circuit Court of Appeals for the Seventh Circuit has decided an important question of local law in a way in conflict with the applicable decisions of the appellate courts of Indiana in disregard of the rule established by this Court in *Erie Railroad v. Tompkins,* 304 U. S. 64; *Stoner v. New York Life Insurance Company,* 85 L. ed. (adv.) 275; *Wichita Royalty Company, et al. v. City National Bank,* 306 U. S. 103; *Equitable Life Insurance Co. of Iowa v. Halsey, Stuart &* Company, 85 L. ed. (adv.) 631; and similar cases announcing the same rule, in that it refused to follow the Indiana decisions set out below which hold:

(a) That in the computation of the duration of extended term insurance from the date of the policy as provided by the insurance contract, the first day is to be excluded and the last day included because the word "from" is a word of exclusion and not of inclusion.

Matthews Farmers Mutual Life Stock Insurance Co. v. Moore (1914), 58 Ind. App. 240, 245;

Williams v. Chambers, et al. (1926), 85 Ind. App. 404, 406, 407.

(b) That ambiguous provisions of insurance policies should be construed most favorably to the insured in order to avoid a forfeiture, and most strongly against the insurance company because it prepared the policy contract.

Masonic Accident Insurance Co. v. Jackson (1928), 200 Ind. 472, 481, 482;

Atkinson, Administrator, v. Indiana National Life Insurance Co. (1924), 194 Ind. 563, 568;

Federal Life Insurance Co. v. Kerr (1909), 173 Ind. 613, 618.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its dockets No. 7499, *American National Bank at Indianapolis, as Trustee, v. The Service Life Insurance Company*, and that the decree of said United States Circuit Court of Appeals in said cause be re-

versed by this Court, and that the petitioner have such other and further relief in the premises as to this Court may seem just.

WILLIAM H. THOMPSON,
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Counsel for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1941

AMERICAN NATIONAL BANK AT INDIANAPOLIS, as Trustee,
Petitioner,

v.

THE SERVICE LIFE INSURANCE COMPANY,
Respondent.

No. .....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION BELOW.

The District Court neither gave nor filed a written opinion, but found the facts specially (R. 12-56) and stated thereon its conclusions of law (R. 57).

The opinion of the Circuit Court of Appeals filed on May 9, 1941, appears at pages 70 to and including 77, of the record, and is reported in 120 F. (2d) 579. No opinion of the Circuit Court of Appeals was filed in overruling the petitioner's petition for rehearing. (R. 80.)

II.

JURISDICTION.

A statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction is set out in the petition for writ of certiorari at page 2.

III.

STATEMENT OF THE CASE.

A full statement of the case having been given in the petition for certiorari, for brevity is not here repeated.

IV.

ASSIGNMENTS OF ERROR.

The Circuit Court of Appeals erred in the following particulars:

(1) In refusing to follow the rule announced by this Court in *Erie Railroad v. Tompkins,* 304 U. S. 64; *Wichita Royalty Company, et al. v. City National Bank,* 306 U. S. 103; *Equitable Life Insurance Co. of Iowa v. Halsey, Stuart & Company,* 85 L. ed. (adv.) 631; and similar cases, in that the Circuit Court of Appeals refused to follow the controlling Indiana decisions which hold:

(a) That in the computation of the duration of extended insurance *from* the date of the policy, in conformance with the policy provisions, the first day should be excluded and the last day included;

(b) Ambiguous insurance policies should be construed

most favorably to the insured in order to avoid a forfeiture, and most strongly against the insurance company because it prepared the policy contract.

V.

ARGUMENT.

A.

Complete jurisdiction in the United States Supreme Court is shown by the record.

Since this is a civil case in the United States Circuit Court of Appeals for the Seventh Circuit, the petitioner was a party to such case. (R. 1, 12.) Judicial Code, Sec. 240 (a), amended February 13, 1925, June 7, 1934 (43 Stat. 938; 48 Stat. 926, 28 U.S.C. 347).

B.

The Circuit Court of Appeals held that the four years and four months of extended term insurance to which the insured became entitled upon default in premium payments, expired on February 4, 1939, and that the policy was not in effect at the time of the insured's death on February 5, 1939.

The facts are undisputed. The respondent issued its policy of life insurance dated October 5, 1930, in the face amount of $5,000 on the life of Charles Leona Badger. He paid four full annual premiums. The premium were due in advance. (R. 44, offered R. 11.) The advance premium due on or before October 5, 1934, was not paid nor were any premiums paid thereafter. There were no policy loans. After payment of four full annual premiums, if default oc-

curred, the policy contract automatically gave insured four years and four months extended insurance. (R. 16.)

The insured died on February 5, 1939.

If, therefore, in computing the extended insurance of four years and four months, the first day, viz: October 5, 1934, is included in conformance to Indiana law, the extended insurance was in force and effect on February 5, 1939, the date of insured's death.

The policy recites that the consideration is the sum of $299.85 to be paid in advance,

> "being the premium for the term ending one year *from* the date hereof." (R. 41, offered R. 11.) (Emphasis supplied.)

and refers to the further payment

> "in advance of annual premiums of $299.85 on or before the 5th day of October of each year during the continuance of this policy." (R. 44, offered R. 11.)

On January 2, 1935, respondent wrote the insured that the policy had lapsed for non-payment of premium and the policy was continued as extended insurance "dating from October 5, 1934." (R. 14, offered R. 11.)

The insured acknowledged the January 2 letter and asked: "Will you please inform me of the date of expiration this term insurance?" (R. 15, offered R. 11.)

Respondent replied that the policy would continue under the extended insurance feature "to February 5, 1939." (R. 15, offered R. 11.)

In *Mathews Farmers Mutual Live Stock Insurance Com-*

pany v. Moore (1915), 58 Ind. App. 240, 245, Moore became a member of appellant Insurance Company on February 21, 1911, and a policy on certain live stock was issued to him on that day. At 10 o'clock P. M., on May 4, 1911, one of Moore's horses covered by the policy died. On May 10, he notified the company and made proof of loss.

The policy provided that:

> "The members of this association shall not be liable if any loss occurs to the insured after thirty (30) days from notice of each and all assessments, when assessments are unpaid."

At 8 o'clock A. M. on April 4, 1911, Moore received a notice from the company that an assessment was due from him. At 5 o'clock P. M. on May 4, 1911, Moore mailed a post office money order to the Insurance Company for the amount of the assessment. The Insurance Company denied liability and contended that in computing the thirty days allowed for the payment of the assessment, April 4, 1911, the day on which the notice was received by Moore, should be included, and that therefore Moore was one day late in the payment of his assessment, and not entitled to recover.

The Court said:

> "In its usual meaning and application the word 'from' is exclusive and not inclusive. It is a term of exclusion and not inclusive. It is a term of exclusion unless by the plain meaning of the context in which it is employed, or by necessary implication, it is shown to have ben used in a different sense. * * *
>
> "The contract here provides for non-liability of the company where loss occurs, 'after thirty days from notice.' This language certainly indicates that thirty days were given without counting the day

on which the notice was received. If we were to substitute 'one' for 'thirty,' and apply the rule contended for, it would mean that the assessment would have to be paid on the day the notice was received.

"In *Inhabitants, etc. v. Inhabitants, etc.* (62 Mass. 371), *supra*, 374, the court held to the rule of excluding the first day and said 'otherwise, an act to be done in one day must be done on the same day; and as there is no fraction of a day, such stipulation must create an obligation to do it *instanter*.' Fractions of days are not counted in such calculations and the words 'after thirty days from notice' as used here means thirty days after the day on which the notice was received, excluded that day. Such construction is well supported by authirty." (Citing cases.)

In *Williams v. Chambers, et al.* (1926), 85 Ind. App. 404, 406, it was held that a contract giving real estate brokers the exclusive right to sell real estate for six months from January 10th did not expire until July 11th.

The Court said:

"It seems to be the general rule that 'from' excludes the *terminus a quo*. 27 C. J. 908. The following Indiana cases have held that in promissory notes due a specified time 'after date,' the day upon which the note was made was excluded: *Benson v. Adams* (1879), 60 Ind. 353, 35 Am. Rep. 220; *Fisher v. State Bank* (1845), 7 Blackf. (Ind.) 610; *Bowen v. Julius* (1895), 141 Ind. 310, 40 N. E. 700. In *Newby v. Rogers* (1872), 40 Ind. 9, 16, it was held that where property is contracted to be delivered 'from the 15th to the 28th' of a specified month, both the 15th and the 28th are to be excluded. * * * Excluding the first day, the contract here involved had not expired on July 11, 1924."

The Indiana Legislature has fixed the method of the

computation of time in civil procedure matters by statute which provides that:

> "The time within which an act is to be done as herein provided shall be computed by excluding the first day and including the last. * * *"
>
> (Burns' Indiana Statutes Annotated 1933, Sec. 2-4704.)

It is submitted that this statute is declaratory of the public policy of Indiana respecting the manner of computing time.

Applying the Indiana rule (as well as that announced by other jurisdictions [1]), the extended insurance would have commenced on October 6, 1934. The addition of four years and four months of extended insurance continued the policy term to and including February 5, 1939, the date of death of the insured.

This construction is consistent with the policy provisions that the premiums, including the first premium, are to be paid *in advance*. If October 5th were the last permissible date for the payment of an annual premium, as the policy provides, and if the premium was to be paid in advance, as the policy also provides, then the policy term would

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[1] *Zimmerman v. U. S.* (1921), 277 Fed. 965;
In re Hamilton (1928), 29 F. 2nd 281.

In *Protection Life Insurance Co. v. Palmer*, 81 Ill. 88, 95, it was held that the word "from" in a policy of insurance requiring the payment of an assessment within thirty days from the notice thereof, is to be construed as showing that the time is to be computed by excluding the day on which the notice is received.

Compare
Sheets v. Selden's Lessee (1865), 2 Wall. 177, 190;
Mutual Life Insurance Company of New York v. Hurni Packing Co. (1923), 263 U. S. 167, 174;
Best v. *Polk* (1875), 85 U. S. 112, 119.

have started not on the date for the payment of premium but the next day following, viz: October 6th.

That the parties so contracted is evident also from the fact that the premium for the policy year was to be paid *in advance* and was payable on or before October 5 in each year. Clearly the insured would not have been in default on his premium payments had they been made any time during the entirety of the 5th day of October. Since the premium was *in advance* and for the year *from* the date of the policy, viz: October 5, the policy year commenced on October 6 each year that premiums were paid.

Hence, in the computation of the four years and four months extended insurance to which insured became entitled, October 5, 1934, should have been excluded, and February 5, 1939, the day of death, included.

If this is not true, then the language of the policy does not mean what it says and is ambiguous and is subject to be construed most strongly against the insurer, as we point out hereinafter.

C.

The Circuit Court of Appeals held that it was the intention of the parties that the date of the policy was its first effective day, and hence the Court disregarded the language of the policy in that it was for a term *from* the day of its date. (R. 75, 76.)

On the application for insurance there appears the following: "Policy to be dated Oct. 5, 1930." (R. 40, offerd R. 11.) The stipulation recites that: "If the policy had been dated October 6, 1930, the insured would have been required to pay the premium for age at issue of 53 years instead of 52 years." (R. 18.)

The Circuit Court of Appeals said:

> "From an insurance standpoint, insured became 53 on October 6, 1930. He well knew this and knew that if his contract was not made effective on or before October 5 that he would be required to pay a higher premium rate. Knowing this, he specifically requested that his contract be dated October 5, 1930." (R. 76.)

An analysis of the statements shows the parties contracted that in the computation of time the first day should be excluded and the last included. The insured's birth date was April 6. (R. 17.) If, as the Court said, insured from an insurance standpoint, became 53 years of age on October 6, 1930, it was because his nearest birthday was April 6, 1931.

April 6, 1931, was insured's nearest birthday only if in computing time commencing on October 6, 1930, the first day is excluded. By including October 6, 1930, and counting forward, the six months would expire on April 5, 1931, or one day before insured's birthday on April 6th.

It seems apparent from the foregoing that the parties adopted the rule for the computation of time announced by the Indiana decisions, viz., that the first day is to be excluded and the last to be included.

The policy provides that the annual premiums to be paid in *advance* on or before October 5 are "for the term ending one year from the date hereof." (R. 41.)

The policy was executed at Lincoln, Nebraska, on October 5, 1930 (R. 42). The insured's application provided that the policy contract "shall not take effect until the first annual premium shall have been paid during my lifetime and *good health.*" (Emphasis supplied.) (R. 39.) The application also provided: "I have paid to the agent soliciting

this application the sum of $200.85 in current funds and hold this receipt therefor and I agree to submit to a medical examination within *thirty days from date.*" (R. 40.) (Emphasis supplied.) The application was dated September 25, 1930. (R. 40.)

Since the policy contract by agreement of the parties did not take effect until the first annual premium had been paid during the lifetime of the insured, and while he was in good health, and since the insured was not obligated to submit to medical examination until 30 days from the date of the application, which was September 25th, it does not follow that the parties agreed that the contract would be effective from the date of its date, October 5, 1930.

D.

The Circuit Court of Appeals held that:

> "There is no ambiguity in the insurance contract under consideration, but the stipulated facts disclose a complete and explicit understanding of the parties." (R. 75.)

As pointed out above, the insured, on his application, requested that his policy be dated October 5, 1930. He agreed that the policy contract would not be in effect until the first annual premium had been paid during his lifetime and while he was in good health and to submit to a medical examination, presumably to determine the state of his health, within 30 days from the date of the application, September 25, 1930.

On January 2, 1935, insured was notified by respondent that his policy was "continued as non-participating term insurance *dating from October 5, 1934* * * *" (Emphasis supplied. (R. 14., offered R. 11.)

On January 8th the insured wrote the respondent as follows:

> "I am in receipt of yours of the 2nd inst. say-that my policy No. 5221 was now continued as non-participating term insurance, dated from 10-5-34.
>
> "Will you please inform me of the date of expiration of this term insurance. I wish to know at this time the date on which this insurance will expire." (R. 15, offered R. 11.)

Respondent answered on January 11th, advising the insured that the policy "will continue under this feature to February 5, 1939." (R. 15, offered R. 11.)

This correspondence indicates clearly that the insured did not understand the terms of his policy. Surely the two letters of respondent are not clear because the first gives one expiration date the second another.

In *Atkinson, Admr., v. Indiana National Life Insurance Company* (1924), 194 Ind. 563, 568, the Court said that:

> "This very state of conjecture suggests the rule of law, long adhered to, that, in construing an insurance contract, which, by ambiguities, is capable of two reasonable interpretations, that interpretation will be adopted which is most favorable to the insured, and against the insurer."

In *Masonic Accident Insurance Co. v. Jackson* (1929), 200 Ind. 472, 481, 482, the Indiana Supreme Court said:

> "It is elementary in the construction of insurance policies that where insurance contracts are so drawn as to be ambiguous or require interpretation or are fairly susceptible of two different constructions so that reasonably intelligent men on reading them would honestly differ as to their meaning, the courts will adopt that construction most favorable to the insured. (Citing cases) * * *

> "If the policy be ambiguous, the doubt will be resolved against the insurer. (Citing cases) * * *
>
> "An insurance policy should be so construed as to effectuate indemnification to the insured or his dependent beneficiary against loss, rather than to defeat it * * *
>
> "Where any reasonable construction can be placed on a policy that will prevent the defeat of the insured's indemnification for a loss covered by general language, that construction will be given."

The reason for the rule announced in the above cases is that insurance contracts "are carefully prepared by the companies themselves, their effect carefully weighed, and the parties do not deal upon an equal footing in fact."

Federal Life Insurance Co. v. Kerr (1909), 173 Ind. 613, 618.

E.

Had this case been before the Indiana Supreme Court, we submit that it would have been held on the stipulated facts and the rules laid down in the Indiana cases cited in this brief, that the insurance policy in question here was in full force and effect on February 5, 1939, the date of the death of the insured. No argument advanced or no case cited by the Circuit Court of Appeals persuades otherwise. (See *Equitable Life Insurance Co. of Iowa v. Halsey, Stuart & Co.* (1941), 85 L. ed. (adv.) 631, 640.

WHEREFORE, petitioner prays that the writ be granted.

WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Counsel for Petitioner.